
BONNEVILLE V. REGISTER OF COPYRIGHTS: BROADCASTERS' UPSTREAM BATTLE OVER STREAMING RIGHTS

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I. INTRODUCTION

The first commercial radio station in the United States aired its initial broadcast from Pittsburgh, Pennsylvania in the Fall of 1920.¹ Since those early days of radio, broadcasters have not been liable to record companies for the public transmission of copyrighted sound recordings aired as part of their programming. There are two primary reasons why radio broadcasters have been able to escape liability. First, the right to the public performance of sound recordings did not exist until 1971.² Second, when Congress finally recognized an exclusive right in the public performance of sound recordings in 1995, it limited that right to the public performance of sound recordings by means of a digital transmission. The newly-created liability was mainly for Internet-based interactive subscription services and did not affect FCC-licensed radio stations.³

By 1998, Congress had broadened the exclusive right in sound recording to include protection against illegal transmission by certain non-interactive nonsubscription services, known as "webcasters," because a large number of FCC-licensed ra-

dio stations had begun streaming their signals through the Internet.⁴ Between 1998 and 2000, it was unclear whether the new legislation concerning digital transmissions extended to FCC-licensed AM/FM radio stations that streamed their own signals over the Internet rather than through third party webcasters.⁵

A recent ruling by the Copyright Office ("Office") has determined that AM/FM radio stations that want to simultaneously stream their broadcast signals through the Internet will be liable to record companies for the public performance of copyrighted sound recordings unless they comply with certain programming and technical requirements and apply for a license.⁶ Compliance with the Copyright Office's licensing requirements could cost radio stations millions of dollars in additional expenses and annual royalties to record companies.

This Note examines the copyright debate over the simultaneous streaming of broadcast signals by FCC-licensed AM/FM radio stations through the Internet. Part I examines the "streaming" technology and its significance in the context of

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¹ Barry Mishkind, *The First Hundred Stations in the United States*, at <http://oldradio.com/archives/general/first100.html>, (last visited Nov. 12, 2001) (listing KDKA's transmission on Oct. 27, 1920 as the first radio broadcast); see also KDKA RADIO, at <http://trfn.clpgh.org/nmb/nmbkdka.htm>, (last visited Nov. 18, 2001) (reporting that the first broadcast of KDKA radio by Harry P. Davis, a Vice President of Westinghouse Electric, is considered the start of the broadcasting industry).

² Joshua D. Levine, *Dancing to a New Tune, A Digital One: The Digital Performance Right in Sound Recordings Act of 1995*, 20 SETON HALL LEGIS. J. 624, 630 (1996) [hereinafter Levine].

³ Jeffery A. Abrahamson, *Tuning Up for a New Musical Age: Sound Recording Copyright Protection in a Digital Environment*, 25

AM. INTELL. PROP. L. ASS'N Q.J. 181, 205-206 (1997) [hereinafter Abrahamson].

⁴ See David J. Wittenstein & M. Lorrane Ford, *The Webcasting Wars*, J. INTERNET LAW, Feb. 1999, available at http://www.gcwf.com/articles/journal/jil_feb99_2.html (last visited Sep. 8, 2001) [hereinafter Wittenstein & Ford]. See also Jerry S. Birenz, *Internet Publishing: The Legal and Business Issues as Traditional Publishing Moves to Electronic Media- Webcasting Music*, 601 PRAC. L. INST. PAT. COPYRIGHTS, TRADEMARKS & LITERARY PROP. COURSE HANDBOOK SERIES 209, 220-221 (2000) [hereinafter Birenz] (discussing the status of eligible non-interactive nonsubscription transmissions under the DMCA).

⁵ *Id.* at 224.

⁶ Public Performance of Sound Recordings: Definition of a Service, 65 Fed. Reg. 77,292 (Dec. 11, 2000) (to be codified at 37 C.F.R. § 201.35).

the copyright liability of FCC-licensed radio broadcasters. Part II presents a brief overview of the history and evolution of the right of public performance of sound recordings and, more specifically, the evolution of Section 114 of the Copyright Act as amended in 1995 and 1998. Part II will also discuss the Copyright Office's final ruling and the effect of the new law on the applicability of Sections 106 and 112 of the Copyright Act to FCC-licensed AM/FM radio stations seeking to simultaneously stream their broadcast signals over the air and through the Internet.

Part III examines the United States District Court's opinion in *Bonneville v. Register of Copyrights*, where radio broadcasters and the National Association of Broadcasters ("NAB") challenged the Copyright Office's authority to rule on the liability of broadcasters. Part III discusses the rationale behind the Copyright Office's rulemaking, specifically, whether it adequately balances Congress' intent to safeguard record producers from illegal copying, while preserving the traditionally symbiotic relationship between radio broadcasters and the recording industry. Part III also applies the *Bonneville* analysis and the parties' arguments to conclude that the Copyright Office's recent rulemaking is not solely motivated by the Recording Industry Association of America's ("RIAA") fear of declining sales, but that it is also a long awaited opportunity for the Office to subject FCC-licensed radio stations to copyright liability for the public performance of sound recordings. Part IV discusses the options available to radio stations under the new law, should they lose their appeal in the *Bonneville* case.

II. HOW STREAMING WORKS

Radio stations use a process called "streaming" to broadcast their signals over the Internet.⁷ This process was pioneered by RealNetworks, who developed "Real Audio," a file format used to transmit audio files through the Internet.⁸ Streaming involves the creation of a temporary file on the user's hard drive that "buffers" the sound and plays it on the user's computer without having to download the entire file.⁹ Buffering refers to a process by which the file enters the user's computer and is saved as memory, or "cache," on the user's hard drive before being streamed. The RealPlayer software on the user's computer contacts a "RealServer" that sends the audio file to the end-user's computer at his or her request.¹⁰ RealPlayer is able to read the file stream as it comes in and transmits it as a smooth stream of sound without causing the user to download the entire file onto the hard drive.¹¹

In the case of a radio broadcast, the end-user has no control over the selection of music or the sequencing of songs, nor can he or she replay the song or save it on the computer's hard drive. This process is very much like listening to an old-fashioned radio.¹² Instead of turning on the radio, the listener can simply click on a link to listen to an ongoing broadcast program. The computer, using a decoder or "plug-in," converts the digital information contained in the RealAudio files into sound waves, i.e., analog information, so that the end-user can listen to it.¹³

Using this process, FCC-licensed radio stations can retransmit their own signals over the Internet

⁷ Charles Lozow and Neil Rosini, *Music, the Internet and New Media: Special Problems*, in 505 PRAC. L. INST. PAT. COPY-RIGHTS, TRADEMARKS & LITERARY PROP. COURSE HANDBOOK SERIES 637, 640-641 (1998) [hereinafter Lozow & Rosini].

⁸ REALNETWORKS, DIGITAL MEDIA GLOSSARY, at <http://realnetworks.com/glossary.html> (last visited Nov. 12, 2001) [hereinafter GLOSSARY].

⁹ Martha F. Phelps, *Complying with Requirements for a Statutory License in Sound Recordings Under the Digital Millennium Copyright Act of 1998*, 45 B. B.J. 6, 6 (2001) [hereinafter Phelps] (commenting, "the streaming of live audio involves the transmission of 'a continuous 'stream' of data that is temporarily stored ('buffered') in the listener's computer, and converted into audio signals by music 'player' software)."

¹⁰ REAL NETWORKS, REALPLAYER 8 PLUS USER MANUAL CHAPTER 6: WHAT IS STREAMING MEDIA AND HOW DOES IT

WORK?, at http://service.real.com/help/player/plus_manual.8/rppmanual.htm (last visited Dec. 22, 2001) [hereinafter REALPLAYER MANUAL] (instructing that when the user clicks on an audio link, the RealPlayer software on the user's computer sends a small pointer file that contains the name and the location of the requested audio clip on the RealServer. Next, the user's "RealPlayer contacts the RealServer which sends the actual stream and stays in contact with Real Server" while the file is playing, allowing the user to manipulate the file by fast-forwarding or rewinding the clip. In the case of live broadcasts, "RealPlayer speaks directly to the RealServer without the need for the earlier pointer file.").

¹¹ See *id.*

¹² See Lozow & Rosini, *supra* note 7, at 640-641.

¹³ REALPLAYER MANUAL, *supra* note 10.

without having to create a separate webcast program.¹⁴ However, the Office considers the creation of temporary files on a user's hard drive, which is necessitated by the streaming process, an infringement of both the sound recording and the performance rights of copyright owners. Thus, the Office amended Section 114 of the Copyright Act,¹⁵ which requires webcasters to obtain a statutory license, as well as the ephemeral recording provisions of Section 112.¹⁶

III. AN OVERVIEW OF THE PUBLIC PERFORMANCE RIGHT IN SOUND RECORDINGS

A. Separate Rights for Record Companies: History of Performance Rights in Sound Recordings

The Supreme Court first recognized the right in sound recording as separate from the right to the underlying musical work in *White-Smith Music Publishing Co. v. Apollo Co.*¹⁷ In *White-Smith*, the Court held that the perforated rolls used to reproduce the sounds of a musical work in mechanical piano players are separate from the underlying copyrighted musical composition and do not infringe on the right to the musical composition they reproduce.¹⁸ The Copyright Act of 1909 did not refer to sound recordings because, at the time of the Act, only tangible copies such as

written sheets of music were protected, not the sound recording of a musical performance. According to Justice William Rufus Day, "only the tangible thing is dealt with by the law, and its multiplication or reproduction is all that is protected by the statute."¹⁹

The Copyright Act of 1909 protected only "for-profit" public performances of a musical work.²⁰ More than sixty years later, Congress extended copyright protection to sound recordings by passing the Sound Recordings Act of 1971.²¹ However, this Act was primarily intended to protect record companies from the illegal copying of tapes and records, and did not cover the exclusive right to public performance of sound recordings.²² Despite the recording industry's effort to have an exclusive right of public performance of sound recordings recognized for copyright owners, the 1976 Act retained the same provisions as the 1971 Act.²³ The 1976 Act protected the record companies against illegal duplication of records and tapes but still did not recognize an exclusive right to the public performance of these recordings.²⁴

Under the 1971 and 1976 Acts, FCC-licensed radio stations were required to pay royalties to composers and publishers in exchange for the right to perform the copyrighted works on the radio. But the Act did not recognize a comparable right of public performance for the radio broadcast of sound recordings.²⁵ Consequently, radio stations

¹⁴ See Birenz, *supra* note 4, at 224.

¹⁵ 17 U.S.C. §114(d)(2)(C) (2000).

¹⁶ *Id.* §112.

¹⁷ 209 U.S. 1 (1908).

¹⁸ *Id.* at 10, 13 (citing *Boosey v. Whight*, 1 Ch. 122 (1900)).

The plaintiffs are entitled to copyright in three sheets of music. What does this mean? It means that they have the exclusive right of printing or otherwise multiplying copies of those sheets of music, i.e., if the bars, notes, and other printed words and signs on those sheets. But plaintiffs have no exclusive right to the production of the sounds indicated by or on those sheets of music; nor to the performance in private of the music indicated by such sheets; nor to any mechanism for the production of such sounds or music.

Id. at 13.

¹⁹ *Id.* at 11.

²⁰ Stephanie Haun, *Musical Works Performance and the Internet: A Discorance of Old and New Copyright Rules*, 6 RICH. J.L. & TECH. 3, 8 (1999) [hereinafter Haun] (discussing the introduction of a "for-profit" requirement as a condition for protection of performance right for musical works, but not for sound recordings, where the music user charged an admission fee for the performance).

²¹ See Rebecca F. Martin, *The Digital Performance Right in Sound Recordings Act of 1995: Can It Protect U.S. Sound Recording Copyright Owners in a Global Market?*, 14 CARDOZO ARTS & ENT. L.J. 733, 736 (1996) [hereinafter Martin].

²² *Id.* at 737 (explaining that the 1971 Act extended copyright protection to sound recordings, but only to protect against illegal reproduction of phonorecords and tapes).

²³ *Id.* at 737-39 (discussing the Copyright Office's and the recording industry's recommendations that Congress include a public performance right in the early drafts of the 1976 Act, although they did not make it into the final version of the Act).

²⁴ 17 U.S.C. §114(a) (2000).

²⁵ Before 1995, the Act protected copyrighted material being performed in public only if the performance was for profit, e.g., if the establishment charged an admission fee. Public performance in public places such as hotels or stores was exempted by statute if the establishment used "an apparatus of a kind commonly used in private homes." For purposes of determining the statutory exemption, the court would only consider the type of apparatus used and not the size of the establishment itself; see, e.g., *Cass County Music Co. v. Muedini*, 821 F. Supp. 1278 (E.D. Wis., 1993); *Edison Bros. Stores, Inc. v. Broadcast Music, Inc.*, 954 F.2d 1419 (8th Cir. 1992).

did not infringe upon public performance copyrights during a broadcast.²⁶

As new technological advances challenge the boundaries of copyright law, the need for new legislation has become apparent. Digitization of information is the latest challenge to the traditional notions of copyright law. In 1994, pursuant to the General Agreement on Tariffs and Trade ("GATT"), Congress added a new Chapter 11 to the Copyright Act. This Chapter prohibits the unauthorized fixation of "sounds or sounds and images of a live musical performance in a copy or phonorecord," as well as the transmission or communication to the public of "sounds or sounds and images of a live musical performance."²⁷

One year later, Congress enacted the Digital Performance Right in the Sound Recordings Act of 1995 ("DPRA").²⁸ For the first time since the 1976 Act, the DPRA granted record companies an exclusive right in the public performance of their sound recordings "by means of a digital audio transmission."²⁹ Congress added a new subsection to Section 106 of the Copyright Act that recognized an exclusive right in the digital performance of a copyrighted sound recording.³⁰ Protection against illegal transmissions by interactive or on-demand Internet services, such as Napster, motivated the creation of this exclusive right.³¹ The DPRA, however, did not extend the exclusive

right's coverage to analog or digital radio broadcasts. More importantly, it was silent as to the status of radio stations that stream their broadcast signals simultaneously through the Internet.³²

Legislative history reveals that broadcasters were in favor of the DPRA because it did not impose liability on FCC-licensed radio stations and because it targeted Internet-based digital audio subscription services that could potentially compete with commercial radio stations.³³ In addition to exclusive rights, the DPRA created four categories of transmissions that were subject to a compulsory license. One such category encompassed certain audio transmissions by subscription services.³⁴

Finally, in 1998, Congress enacted the Digital Millennium Copyright Act ("DMCA"), amending Section 114 of the Copyright Act to exempt certain transmissions from the exclusive public performance rights in sound recordings found in Section 106.³⁵ The DMCA resulted from negotiations between webcasters and the Recording Industry Association of America ("RIAA"). It specifically addressed webcasting activities on the Internet³⁶ and subjected certain non-interactive, non-subscription digital transmissions of sound recordings over the Internet to statutory licensing.³⁷

²⁶ 17 U.S.C. §114(c) (1976). Section 114 of the Copyright Act of 1976 defined the scope of exclusive rights in sound recordings and specified, under subsection (c), that it "does not limit or impair the exclusive right to perform publicly, by means of a phonorecord, any of the works specified by section 106(4)." *Id.*

²⁷ 17 U.S.C. §§1101(a)(1)–(2) (2000).

²⁸ Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, 109 Stat. 336 (1995) [hereinafter DPRA].

²⁹ *Id.*; see also MARSHALL LEAFFER, UNDERSTANDING COPYRIGHT LAW 10 (3d ed. 1999) (discussing the exclusive rights of copyright ownership under the 1976 Act) [hereinafter LEAFFER].

³⁰ 17 U.S.C. §106(6) (2000); see also Steven J. Pena, *Licensing Music for Use on the Internet*, 662 PLI 525, 528 (2001) [hereinafter Pena] (explaining that songwriters and music publishers negotiate their copyright license fees through the Harry Fox Agency, while public performance rights are negotiated through performing rights societies such as ASCAP, BMI and SESAC); see also Phelps, *supra* note 9, at 19 (explaining that webcasters will have to pay the statutory license fees directly to RIAA).

³¹ *Bonneville Int'l Corp. v. Marybeth Peters*, as Register of Copyrights, 153 F. Supp. 2d 763, 767 (E.D. Pa. Aug. 1, 2001).

³² Summary, United States Copyright Office, The Digital

Millennium Copyright Act of 1998, U.S. Copyright Office Summary at 15 (December 1998). Under the DPRA, the newly created right to performance right in sound recordings was limited to the digital transmission of those sounds.

³³ See LEAFFER, *supra* note 29, at 355.

³⁴ *Id.* at 11 (discussing the four compulsory licenses under the 1976 Act).

³⁵ The Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified as amended at 17 U.S.C. §§106, 112, 114 (1998)) [hereinafter DMCA]; see also LEAFFER, *supra* note 29, at 14-15 (explaining that the DMCA was designed to implement two international digital treaties, the World Intellectual Property Organization ("WIPO") Copyright Treaty and the WIPO Performers and Phonograms Treaty).

³⁶ See Honorable Marybeth Peters, Register of Copyrights, *Statement of the Register of Copyrights before the Subcommittee on Courts and Intellectual Property Committee on Judiciary United State House of Representatives* at <http://www.lcweb.loc.gov/copyright/docs/regstat61500.html> (last visited June 15, 2000) [hereinafter Peters].

³⁷ DMCA §402. The DMCA did not envision displacing the exemption for original transmissions made by an FCC-licensed broadcaster. The new Section 112 permitted transmitting entities other than broadcasters to make ephemeral copies of sound recordings for the transmissions originating on the Internet.

B. The Status of AM/FM Radio Broadcasters Under Section 114.

Under Section 114 of the Copyright Act,³⁸ all AM and FM radio stations licensed by the FCC are exempt from paying a licensing fee to record companies for the public performance of sound recordings involved in broadcasting.³⁹ On December 11, 2000, the Copyright Office ruled that FCC-licensed radio stations that simultaneously stream their broadcast signals over the Internet are not exempt from copyright liability under Section 114(d)(1)(A).⁴⁰ Section 114 provides that the public performance of a sound recording is exempt from copyright if it is "part of a nonsubscription transmission other than a retransmission."⁴¹ The ruling came after a period of uncertainty regarding the DMCA's position on the exemption status of traditional radio stations that simultaneously stream their signals through the Internet and the reach of Section 114 as amended.

In most cases, a sound recording is copyrighted separately from the underlying musical work. However, even under the new law, radio stations do not pay a licensing fee to record companies for the public performance of sound recordings. This is arguably because record companies receive free advertising when the recorded songs are played on the radio.⁴² Thus, FCC-licensed radio stations that transmit their broadcast signals through a "terrestrial" antenna do not infringe copyrights. Until the Office's December ruling, it was unclear

whether FCC-licensed radio stations remained exempt when they simultaneously streamed their signals through the Internet.⁴³ The legislative history of the ruling suggests that when the DMCA added a category of "eligible nonsubscription services," it only referred to webcasters and excluded FCC-licensed broadcasters.⁴⁴ To clarify this, the RIAA petitioned the Copyright Office on March 1, 2000, to rule that traditional FCC-licensed radio stations that simultaneously stream their broadcast signals through the Internet are not exempt from licensing fees.⁴⁵

In comments submitted to the Copyright Office in connection with the petition, broadcasters argued that under Section 114, FCC-licensed AM/FM radio stations that stream their own signals through the Internet are still considered to be engaging in a "nonsubscription broadcast transmission"⁴⁶ and, under the Copyright Act, are not liable to record companies for performance rights.⁴⁷ The RIAA, on the other hand, noted that the Copyright Office defines "transmission" as a terrestrial broadcast by an FCC-licensed radio station,⁴⁸ within a 150-mile radius of a terrestrial antenna, which by definition cannot include Internet broadcasts.⁴⁹ In its final ruling, the Office determined that simultaneous Internet broadcasts are not exempt from copyright liability under Section 114 because the Internet reaches listeners all over the world, and thus, beyond the 150-mile radius. Therefore, the Copyright Office ruled that

³⁸ 17 U.S.C. §114 (2000).

³⁹ See Ronald H. Gertz, *Radio to Pay for Internet Streaming*, 640 PLI/PAT 63, 65 (2001). "These royalties are over and above the fees that radio stations pay to ASCAP [the American Society of Composers, Authors, and Publishers], BMI [Broadcast Music Inc.] and the SESAC [Society of European State Authors and Composers] for the right to perform musical compositions." *Id.*

⁴⁰ See Public Performance of Sound Recordings, 65 Fed. Reg. at 77,292.

⁴¹ 17 U.S.C. §114(d)(1)(A) (2000).

⁴² See generally, Wittenstein & Ford, *supra* note 4.

⁴³ See generally Phelps, *supra* note 9, at 20; see also Birenz, *supra* note 4, at 224 (explaining that the DMCA contains a provision addressing the application of statutory fees to webcasters). However, until recently, it had been unclear whether this provision applied to radio stations that retransmitted their own signals over the Internet. *Id.*

⁴⁴ Peters, *supra* note 36 ("Section 114 of the Copyright Act was amended by expanding the compulsory license for the performance right to sound recording to include 'eligible nonsubscription services' (i.e., webcasters), and Section 112 was amended to address the reproduction rights.").

⁴⁵ *Bonneville Int'l Corp.*, 153 F. Supp. 2d at 770. "[O]n

March 1, 2000, RIAA petitioned the Copyright Office for a Rulemaking to clarify whether AM/FM broadcasters who simultaneously stream their broadcasts over the Internet could claim the section 114 (d)(1)(A) exemption to the public performance right of section 106." *Id.*

⁴⁶ 17 U.S.C. §114(d)(1)(A) (2000).

⁴⁷ *Bonneville Int'l Corp.*, 135 F. Supp. 2d at 772. ("Many broadcasters, and the NAB, have stayed out of the CARP proceedings on the grounds that they qualify for the section 114(d)(1)(A) exemption."). See also Plaintiffs' Memorandum of Law in Opposition to Defendants' Motions to Dismiss or For Summary Judgment and in Support of Plaintiffs' Motion For Summary Judgment at 11, *Bonneville v. Peters*, 2001 U.S. Dist. LEXIS 10919 (E.D. Pa. Aug. 1, 2001) (No. 01-0408) ("Entities, not transmissions, hold FCC licenses").

⁴⁸ 17 U.S.C. §114(j)(3) (2000) (defining a 'broadcast' as "a transmission made by a terrestrial broadcast station licensed as such by the Federal Communications Commission").

⁴⁹ 17 U.S.C. §114(d)(1)(B)(i) (2000) (explaining, "radio stations' broadcast transmission is not willfully or repeatedly retransmitted more than a radius of 150 miles from the site of the radio broadcast transmitter. . . .").

such web broadcasters cannot benefit from the exemption accorded to their over-the-air counterparts under Section 114.⁵⁰

Bonneville International Corp. v. Register of Copyrights was decided on August 1, 2001.⁵¹ The plaintiffs, radio station owners and operators, as well as the National Association of Broadcasters ("NAB"), asked the court to review the Copyright Office's ruling. Plaintiffs challenged the Office's statutory authority to issue a ruling that interpreted Section 114 in the absence of explicit language in the statute or the DMCA.⁵² Ultimately, the court held that the Copyright Office has the authority to issue the ruling and that the ruling was reasonable and consistent with the statute's legislative history.⁵³ The *Bonneville* decision is inconsistent with the legislative histories of the DRPA and the DMCA, which clearly reveal Congress' intent to preserve the traditional relationship between broadcasters and the recording industry.

C. The Public Performance Rights in the Digital Age: The DPRA

Congress enacted the DPRA to protect record companies against the unauthorized digital transmission and copying of sound recordings. It did not change the status of other exempt public performances of digital recordings, including radio broadcasts and compact discs.⁵⁴ The DPRA added a new subsection to Section 106, providing recording companies with the exclusive right to "perform the copyrighted work publicly by means of a *digital audio transmission*."⁵⁵ For the first time, the record companies's exclusive rights to the public performance of their recordings, albeit a limited one, was recognized.⁵⁶ The DPRA also

modified Section 114(d)(1) to provide that a "nonsubscription broadcast transmission"⁵⁷ of a musical performance "is not an infringement of the Section 106" exclusive performance right.⁵⁸

Thus, under Section 114, Congress exempted all analog and digital transmissions by FCC-licensed radio stations from copyright liability for the public performance of sound recordings.⁵⁹ The exemption applied to a "nonsubscription broadcast transmission," as well as to a "retransmission of a nonsubscription transmission," provided that it is within a 150-mile radius of the radio transmitter, and to a "nonsubscription broadcast transmission by a radio station licensed by the FCC [when] retransmitted on a nonsubscription basis by a terrestrial broadcast station, terrestrial translator, or translator repeater licensed by the FCC."⁶⁰ Under the DPRA, FCC-licensed radio stations remained exempt from liability even if a radio station converted from analog to digital transmission.⁶¹ Although the DPRA granted exclusive public performance rights to owners of sound recordings that are transmitted digitally, it also exempted FCC-licensed radio stations regardless of whether they broadcasted through an antenna or streamed their signal using digital technology.⁶²

In addition to the Section 114 exemptions, Section 112 of the Copyright Act exempts the creation of one ephemeral copy of a sound recording for the purpose of transmitting the sound recording to the public.⁶³ It is not a copyright infringement if the transmitting organization makes "no more than one copy" of the copyrighted sound recording and uses it as part of a radio broadcast or a public performance transmitted under license from the copyright owner. In the case of broadcasters, the copy must be used by the radio station

⁵⁰ *Bonneville Int'l Corp.*, 153 F. Supp. 2d at 776. "Section 114(d)(1)(B) allows for the retransmission of over-the-air broadcasts if the retransmission remains within 150 miles of the site of the original radio broadcast transmitter. . . ." *Id.*

⁵¹ *Id.* at 763.

⁵² *Id.* at 771 (citing NAB's Memorandum in Opposition to Defendants' Motion to Dismiss or for Summary Judgment) ("Plaintiffs argue that the Copyright Office lacks the power to determine whether AM/FM streamers are exempt from the section 106 public performance right by section 114(d)(1)(A) because Congress opted not to vest the agency with that authority.").

⁵³ *Id.* at 72 ("The legislative history also points out to congressional intent to use the Copyright Office as an interpreter of copyright law.").

⁵⁴ 139 CONG. REC. S10897 (daily ed. Aug. 6, 1993) (statement of Sen. Hatch) [hereinafter Hatch].

⁵⁵ 17 U.S.C. §106(6) (2000) (emphasis added).

⁵⁶ Digital Performance Right in Sound Recordings Act of 1995, S. 227, 104th Congress, §2 (1995).

⁵⁷ 17 U.S.C. §114(d)(1)(A) (2000).

⁵⁸ *Id.* §114(d)(1).

⁵⁹ *See id.*

⁶⁰ 17 U.S.C. §114(d)(1)(B)(i)(I) (2000).

⁶¹ *Id.* §114(d)(1)(A). Analog transmissions are not affected by the new Section 114 and remain exempt. In addition, Section 114 exempts digital audio transmissions, if the performance is part of a "nonsubscription broadcast transmission." *Id.*

⁶² *Id.*; §114(d)(1)(B)(i)(I). The Section 114 exemption for broadcast transmissions is further limited to a "terrestrial broadcast station . . . licensed by the Federal Communications Commission." *Id.*

⁶³ 17 U.S.C. §112(a)(1) (2000).

for transmissions within its local service area.⁶⁴

Therefore, the DPRA did not change the scope of sound recording liability as applied to FCC-licensed AM/FM radio broadcasters.⁶⁵ The DMCA was enacted three years later to redefine the scope of Section 114 and to bring webcasters within the reach of the statutory license scheme previously applied to cable and satellite transmissions.⁶⁶

D. The Digital Millennium Copyright Act of 1998: ("The DMCA")

Three years later, when Congress enacted the Digital Millennium Copyright Act of 1998, it revised Section 114 to add programming and technological requirements for all Internet-based radio transmissions that were eligible for a statutory license.⁶⁷ In recognition of the performance rights of recording companies, and in a continuing effort to defeat illegal downloading of musical works from the Internet, the DMCA set forth a list

of play restrictions, referred to as the "sound recording performance complement."⁶⁸ Webcasters have to comply with the performance complement in order to be eligible for compulsory licensing under the Act.⁶⁹ In addition, webcasters must implement technological safety measures to prevent users from defeating the site's anti-piracy measures.⁷⁰

The compulsory licensing process is more efficient for webcasters because they can negotiate blanket license fees through the RIAA rather than with each copyright owner.⁷¹ The statutory license applies only to webcasters since, under Section 114, the transmission may not be part of an interactive service.⁷² Under the terms of the license, the transmission must be accompanied by information identifying the sound recording's title and the featured artist's name.⁷³ Also, the sound recording must not exceed the sound recording complement.⁷⁴ In addition, webcasters may not, by way of advance program schedules, make the contents of the program known to the listeners.⁷⁵

⁶⁴ *Id.*

⁶⁵ See Levine, *supra* note 2, at 645-646 (focusing on the effect of DRPA on radio broadcasting).

⁶⁶ See Peters, *supra* note 36, at 1 (discussing the appropriateness of subjecting radio and television Internet streaming to compulsory licensing).

⁶⁷ See Wittenstein & Ford, *supra* note.

⁶⁸ 17 U.S.C. §114(j)(13) (2000):

The 'sound recording performance complement' is the transmission during any 3-hour period, on a particular channel used by a transmitting entity, of no more than—

(A) 3 different selections of sound recordings from any one phonorecord lawfully distributed for public performance or sale in the United States, if no more than 2 such selections are transmitted consecutively; or

(B) 4 different selections of sound recordings—

(i) by the same featured recording artist; or

(ii) from any set or compilation of phonorecords lawfully distributed together as a unit for public performance or sale in the United States, if no more than three such selections are transmitted consecutively: Provided, That the transmission of selections in excess of the numerical limits provided for in clauses (A) and (B) from multiple phonorecords shall nonetheless qualify as a sound recording performance complement if the programming of the multiple phonorecords was not willfully intended to avoid the numerical limitations prescribed in such clauses.

⁶⁹ See *id.*

⁷⁰ 17 U.S.C. §114(d)(2)(C)(viii) (2000):

The transmitting entity accommodates and does not interfere with the transmission of technical measures that are widely used by sound recording copyright owners to identify or protect copyrighted works, and that are technically feasible of being transmitted by the transmitting entity without imposing substantial costs on the transmit-

ting entity or resulting in perceptible aural or visual degradation of the digital signal, except that the requirement of this clause shall not apply to a satellite digital audio service that is in operation, or that is licensed under the authority of the Federal Communications Commission, on or before July 31, 1998, to the extent that such service has designed, developed, or made commitments to procure equipment or technology that is not compatible with such technical measures before such technical measures are widely adopted by sound recording copyright owners.

⁷¹ See INTERNATIONAL WEBCASTING ASSOCIATION, DMCA: MORE MUSIC LICENSING ROYALTIES FOR WEBCASTERS, at <http://www.webcasters.org/legal>. (last visited Sep. 8, 2001). [hereinafter IWA].

⁷² 17 U.S.C. §114(d)(2)(A)(i) (2000).

⁷³ 17 U.S.C. §114(d)(2)(A)(iii) (2000):

[Except] as provided in section 1002(e), the transmission of the sound recording is accompanied, if technically feasible, by the information encoded in that sound recording, if any, by or under the authority of the copyright owner of that sound recording, that identifies the title of the sound recording, the featured recording artist who performs on the sound recording, and related information, including information concerning the underlying musical work and its writer.

⁷⁴ 17 U.S.C. §114(d)(2)(B)(i) (2000); see also *id.* §114(d)(2) (stating that the "complement" refers to the number of songs from the same album, or the same recording artist, that can be played back to back or within a specified time period).

⁷⁵ 17 U.S.C. §114(d)(2)(C)(ii) (2000):

(ii) [T]he transmitting entity does not cause to be published, or induce or facilitate the publication, by means of an advance program schedule or prior announcement, the titles of the specific sound recordings to be transmitted, the phonorecords embodying such sound

Further, webcasters must limit their use of predetermined and archived programming, thereby allowing listeners to determine at what time a particular song is played.⁷⁶ Webcasters must comply with the DMCA's technological requirements to prevent automatic channel switching and scanning of songs by end-users.⁷⁷ Finally, webcasters must implement technological devices to prevent listeners from illegally downloading songs.⁷⁸ Some webcasters are presumably in the process of negotiating licensing fees.⁷⁹ If the parties fail to reach an agreement, however, the matter will be referred to a Copyright Arbitration Royalty Panel ("CARP"), which will determine the licensing fee for each radio station.⁸⁰

In addition to Section 114, the Office updated Section 112 of the Copyright Act⁸¹ to conform to the DMCA. Under Section 112, FCC-licensed radio stations are authorized to make a single ephemeral copy of a sound recording to be used in broadcasting to their "local service area."⁸² The recording industry and the broadcasters, however, do not agree on the meaning of "local service area." Record companies argue that broadcasters' local service area under the DMCA is limited to a 150-mile radius from the broadcast antenna or from the retransmitter antenna.⁸³ Broadcasters, however, argue that for FCC-licensed radio stations that stream over the Internet the "local service area" is global in scope.⁸⁴

Under the terms of the statutory license, webcasters are also exempt from liability under Sec-

tion 112 as long as they comply with Section 114's eligibility requirements however, the exemption granted webcasters seems to contradict the interpretation of the Copyright Office that an infringement occurs each time a temporary file is created on the user's hard drive. Thus, the authorization to create a single ephemeral copy provided by Section 112 does not seem to remedy the infringement situation created by the streaming devices.

E. The Copyright Office's December 11, 2000 Rulemaking

On March 16, 2000, the Office issued a Notice of Proposed Rulemaking ("NPRM") and requested comments from interested parties on whether a radio signal that originated from a traditional radio and streamed through the Internet was exempt under Section 114(d)(1)(A).⁸⁵ On December 11, 2000, the Office issued its final ruling:

amending its regulatory definition of a 'Service' for purposes of the statutory license governing the public performance of sound recordings by means of digital audio transmissions in order to clarify that transmissions of a broadcast signal over a digital communications network, such as the Internet, are not exempt from copyright liability under Section 114(d)(1)(A) of the Copyright Act.⁸⁶

Thus, the Copyright Office amended its regulatory definition of "service" to clarify that transmissions of a broadcast signal over the Internet are

recordings, or, other than for illustrative purposes, the names of the featured recording artists, except that this clause does not disqualify a transmitting entity that makes a prior announcement that a particular artist will be featured within an unspecified future time period, and in the case of a retransmission of a broadcast transmission by a transmitting entity that does not have the right or ability to control the programming of the broadcast transmission, the requirement of this clause shall not apply to a prior oral announcement by the broadcast station, or to an advance program schedule published, induced, or facilitated by the broadcast station, if the transmitting entity does not have actual knowledge and has not received written notice from the copyright owner or its representative that the broadcast station publishes or induces or facilitates the publication of such advance program schedule, or if such advance program schedule is a schedule of classical music programming published by the broadcast station in the same manner as published by that broadcast station on or before September 30, 1998.

⁷⁶ See *id.*

⁷⁷ 17 U.S.C. §114(d)(2)(C)(v) (2000).

⁷⁸ 17 U.S.C. §114(d)(2)(C)(viii) (2000).

⁷⁹ 17 U.S.C. §114(f)(1)(A) (2000). The DPRA provided that within thirty days of enactment, certain nonexempt transmissions would initiate voluntary licensing negotiations with copyright owners. If parties did not reach an agreement, the DPRA directed the Library of Congress to convene a copyright arbitration royalty panel to determine and publish a schedule of rates. *Id.* at §114(f)(B).

⁸⁰ 17 U.S.C. at §114(f)(1)(B) (2000).

⁸¹ 17 U.S.C. §112 (2000).

⁸² *Id.* at §112(a)(1)(B). Under this subsection, an FCC-licensed radio or television station can make one copy of a musical performance if "the copy or phonorecord is used solely for the transmitting organization's own transmissions within its local service area." *Id.*

⁸³ Public Performance of Sound Recordings, 65 Fed. Reg. at 77,300 (citing Broadcasters II Reply Comments at 26) "[Broadcasters] contend they are eligible to make an ephemeral recording under Section 112 (a) because the 'local service area' for a transmission over the Internet is global in scope."

⁸⁴ *Id.*

⁸⁵ *Id.* at 77,292.

⁸⁶ *Id.*

not exempt from copyright liability under Section 114(d)(1)(A).⁸⁷ Thus, the ruling put an end to the uncertainty surrounding the status of FCC-licensed radio stations that stream their own signals over the Internet.

The outcome of the ruling was important because the Office needed to decide whether AM/FM radio stations would be subject to licensing.⁸⁸ If subject to compulsory licensing, the Office wanted to ensure that radio stations participated in the rate negotiations and the determination of license fees through the CARP proceedings.⁸⁹ Despite the Office's ruling, broadcasters maintained that FCC-licensed radio broadcasts fall under the Section 114(d)(1)(A) exemption for "nonsubscription broadcast transmission." Consequently, many broadcasters refused to participate in rate negotiations.⁹⁰

IV. JUDICIAL DETERMINATIONS: *NAB v. RIAA AND BONNEVILLE v. REGISTER OF COPYRIGHTS*

A. NAB, RIAA and the FCC-Licensed Broadcasters

On March 27, 2000, the NAB filed an action in the United States District Court for the Southern District of New York seeking a declaratory judgment that radio broadcasts over the Internet are exempt from license fees.⁹¹ The NAB also requested a stay of the Copyright Office's rulemaking process, pending the outcome of the lawsuit.⁹² The court denied the NAB's motion and allowed

the Office to proceed with the rulemaking.⁹³ Subsequently, the NAB voluntarily dismissed the lawsuit.

After the Office issued its final ruling, a group of radio station operators, including Bonneville, and the NAB, filed an action in the United States District Court for the Eastern District of Pennsylvania seeking judicial review of the Office's ruling. In *Bonneville*, the plaintiffs challenged the authority of the Office to interpret Section 114 where Congress had chosen to remain silent.⁹⁴ The plaintiffs argued that since AM/FM radio stations are exempt from both compulsory and voluntary copyright licensing, their broadcasts fall outside of Section 114's scope and, therefore, the Office lacks the statutory authority to decide the extent of their exemption.⁹⁵

The Office relied on Section 702⁹⁶ of the Copyright Code for its rulemaking authority to "interpret the statute in accordance" with congressional intent and to provide a statutory interpretation where Congress had remained silent.⁹⁷ On August 1, 2001, the *Bonneville* court decided in favor of the Office.

B. Opinion of the Court: The Rulemaking Authority of the Copyright Office

Plaintiffs in *Bonneville* sought judicial review of the Office's December, 2000 ruling that AM/FM radio stations broadcasting simultaneously through the Internet are not exempt from copyright liability under Section 114 (d)(1)(A).⁹⁸ The first issue the court considered was whether the

⁸⁷ *Id.*

⁸⁸ *Id.* at 77,292-77,293.

⁸⁹ *Bonneville Int'l Corp.*, 153 F. Supp. 2d at 772 (opining, "If these parties are not covered by the exemption . . . they should be afforded the opportunity to participate in the CARP proceeding").

⁹⁰ *Id.*

⁹¹ *National Association of Broadcasters v. Recording Industry Association of America*, No. 00 Civ. 2330 (S.D.N.Y., filed March 27, 2000). The NAB filed this action in March and parties submitted briefs and reply briefs. However, the NAB later voluntarily dismissed the case.

⁹² *Public Performance of Sound Recordings*, 65 Fed. Reg. at 77,293 (citing NAB motion to suspend the rulemaking proceeding of the Copyright Office pending the outcome of *NAB v. RIAA*).

⁹³ *Id.* (denying NAB's motion to suspend the rulemaking).

⁹⁴ *Bonneville Int'l Corp.*, 153 F. Supp. 2d at 765.

⁹⁵ *See id.* (noting that, "However, the Broadcasters suggest that the Office may be without authority to interpret the

extent of the section 114(d)(1)(A) exemption"). *Id.* ("Plaintiffs argue that the Copyright Office lacks the power to determine whether AM/FM streamers are exempt from the section 106 public performance right by section 114(d)(1)(A) because Congress opted not to vest the agency with that authority.").

⁹⁶ 17 U.S.C. §702 (2000).

⁹⁷ *Bonneville Int'l Corp.*, 153 F. Supp. 2d at 771 (citing *De Sylva v. Ballentine*, 351 U.S. 570, 577-78 (1956)). In *De Sylva* the Supreme Court "acknowledged" that it would "give weight to the interpretation of an ambiguous statute by [the Copyright Office,] the agency charged with its administration." The court in *Bonneville* adopted the District of Columbia Circuits understanding of *De Sylva* that the Court would "defer to the Copyright Office when the latter actually interpreted the statute." However, the Court in *De Sylva* did not focus on the validity of an Agency rulemaking, but rather on whether the it would "give weight" to an Agency interpretation.

⁹⁸ *Public Performance of Sound Recordings*, 65 Fed. Reg. at 77,293.

Copyright Office had the authority to determine whether AM/FM radio stations are exempt under Section 114.⁹⁹ Relying on case law and legislative history, the court ruled that Congress intended to vest the Office with the authority to interpret the copyright law according to Section 701(b)(2) of the Copyright Act.¹⁰⁰ The court relied on *Chevron U.S.A., Inc. v. National Defense Council, Inc.*¹⁰¹ to conclude that the Copyright Office's determination is entitled to judicial deference¹⁰² because it is a reasonable interpretation of Section 114.¹⁰³ The plaintiffs argued that, in light of the Office's bias in favor of the recording industry and the RIAA, the defendant is not entitled to *Chevron* deference.¹⁰⁴ The court further relied on *Cablevision System Development Company v. Motion Picture Association of America Inc.*,¹⁰⁵ where the court ruled that Congress intended that the Office serve as an administrative "overseer" for the licensing process. In *Cablevision*, the court held that the Copyright Office was empowered to oversee the licensing process when Congress charged the Office with the task of convening the CARPs to determine a statutory license fee in cases where broadcasters and the RIAA failed to reach an agreement after direct negotiations.¹⁰⁶ The Office's oversight authority merely entails delegating to CARPs the

task of determining licensing rates for those webcasters that are subject to statutory licensing.¹⁰⁷ However, the court failed to clarify how the Office's authority to determine the statutory rate for eligible transmissions includes an authority to determine the scope of Section 114 and whether simultaneous transmissions of FCC-licensed radio broadcasts are subject to compulsory licensing.¹⁰⁸

Having determined that the Copyright Office was empowered by Congress to interpret Section 114, the court next considered whether the Office's interpretation of Section 114 was reasonable.¹⁰⁹ According to the court, under Section 114(d)(1)(A), "nonsubscription broadcast transmissions" are exempt from Section 106(6) license fees.¹¹⁰ However, the difficulty arises when one looks at the definition of "broadcast" as "a transmission made by a terrestrial broadcast station."¹¹¹ In its comments to the Office, in response to the Notice of Proposed Rulemaking, the RIAA argued that the exemption is limited to broadcasts transmitted through a terrestrial antenna and does not extend to broadcasts that are digitally streamed through the Internet.¹¹²

The court also pointed out that Congress explicitly subjected webcasters to statutory license fees under Section 114(d)(2),¹¹³ and that, since

⁹⁹ *Id.* at 77,292 (believing that "until the Office rules, the parties will not agree on who qualifies for the Section 114 performance license," RIAA petitioned the Office to rule on the issue of whether AM/FM radio stations streaming their signal over the Internet are exempt from license fees.).

¹⁰⁰ See *Bonneville Int'l Corp.*, 153 F. Supp. 2d at 773 (citing *F.D.A. v. Brown and Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000)); see also *F.D.A. v. Brown and Williamson Tobacco Corp.* at 159. "In extraordinary cases. . . there may be reason to hesitate before concluding that Congress has intended. . . an implicit delegation." But see *Bonneville Int'l Corp.* at 773. The court in *Bonneville* concluded that this was not an extraordinary situation and that Congress had implicitly vested the Office with authority to interpret Section 114.

¹⁰¹ 467 U.S. 837, 842-43 (1984).

¹⁰² See *Bonneville Int'l Corp.*, 153 F. Supp. 2d at 773. The *Bonneville* court discussed *Chevron*'s two-prong test to determine whether an agency action is entitled to judicial deference. Under the *Chevron* test, the court must first determine whether "Congress has directly addressed the precise issue before it." If not, the second prong of the test directs the court to inquire "whether the agency's answer is a reasonable one based on a permissible construction of the statute."

¹⁰³ *Bonneville Int'l Corp.*, 153 F. Supp. 2d at 773.

¹⁰⁴ *Id.* at 774. (discussing plaintiffs' position that the Copyright Office is not entitled to a *Chevron* deference because of its bias to the recording industry).

¹⁰⁵ 836 F.2d 599 (D.C. Cir. 1988).

¹⁰⁶ *Bonneville Int'l Corp.*, 153 F. Supp. 2d at 772. (relying on the designation of the Copyright Office as the agency in

charge of the CARP proceedings in concluding that Congress recognized the Office's expertise in this area).

¹⁰⁷ *Id.* ("[T]he Copyright Office would need the authority to determine which entities and means of transmission were exempted under the Copyright Act.").

¹⁰⁸ *Id.* at 776 (finding the language of Section 114(j)(2) to be facially ambiguous). The court interpreted the phrase "licensed as such by the FCC" to mean that the broadcast stations can only engage in activities licensed by the FCC in order to qualify for the Section 114(d)(1)(A) exemption. The court concludes that because "streaming" is not an activity licensed by the FCC, broadcasters engaged in streaming cannot rely on Section 114(d)(1)(A) to claim an exception from licensing fees. *Id.*

¹⁰⁹ *Bonneville Int'l Corp.*, 153 F. Supp. 2d at 779 (commenting, "I find that the agency's Rulemaking is not just reasonable, but that it reaches the same conclusion as I would in the absence of *Chevron* deference to the Copyright Office.").

¹¹⁰ 17 U.S.C. §106(6) (2000).

¹¹¹ 17 U.S.C. §114(j)(2) (2000).

¹¹² Joint Comments of the Recording Industry Association of America, Inc., Association For Independent Music, American Federation of Musicians and American Federation of Television and Radio Artists at 24-25, Public Performance of Sound Recordings, 65 Fed. Reg. 77,292 (Dec. 11, 2000) (No. RM 2000-3).

¹¹³ 17 U.S.C. §114(d)(2) (2000). Section 114 subjects three categories of transmissions to statutory licensing: 1) subscription digital audio transmissions; 2) eligible nonsubscription transmissions; and 3) nonsubscription transmis-

webcasting involves the same technology that is used by AM/FM broadcasters who simultaneously stream their signal through the Internet, the Office's determination is consistent with Congressional intent insofar as streamed broadcasts are concerned.¹¹⁴ The court thus relied on the language of Section 114(j)(3), which defines a broadcast transmission as a transmission "made by a terrestrial broadcast station licensed as such by the Federal Communications Commission." According to the court's interpretation, "licensed as such" means that broadcasters cannot engage in an activity that the FCC does not regulate, namely, streaming.¹¹⁵ However, the fact that the FCC does not regulate streaming should not be determinative on the issue of whether streamed broadcasts are exempt from the copyright public liability created under Section 106(6).¹¹⁶

The Office argued that in addition to the inconsistencies created by the plaintiffs' reading of the statute with the terms of their FCC licenses, the exemption would conflict with other provisions of Section 114, including the limitation of broadcast retransmissions to their FCC licensed 150-mile radius.¹¹⁷ Therefore, the court concluded that given the language of Section 114 and Congress' concern over all forms of digitally transmitted music that reach people through the Internet, the most reasonable interpretation of Section 114 is that Congress did not intend to exempt AM/FM radio stations that simultaneously stream their broadcasts through the Internet from Section 106(6) liability.

C. Analysis of the Case

The recording industry perceives the technological advances that have given consumers access to digital quality music at a click of a button as a threat to their industry. It is also apparent from the legislative histories of both the DPRA and the DMCA that the main goal of the recent wave of legislation has been to protect record companies against illegal reproduction and digital transmission of copyrighted music.¹¹⁸ However, the court fails to distinguish between the activities of web-based radios on the one hand and the FCC-licensed broadcasters on the other. Web-based radio stations or webcasters are not licensed by the FCC and operate without paying any licensing fees.¹¹⁹ These entities can benefit from a compulsory license scheme since such a scheme would allow them to avoid lengthy licensing fee negotiations with record companies by paying an annual statutory license fee directly to the RIAA.¹²⁰ FCC-licensed AM/FM radio stations, on the other hand, differ from both web-based radio stations and interactive services in that they stream their own broadcast signals over the Internet.¹²¹ Moreover, the radio stations' original broadcast signals are transmitted according to the terms of their FCC licenses. These transmissions are not subject to manipulation by end-users, and as transmitting entities, such broadcasters are not liable to record companies for public performances of copyrighted sound recordings.¹²² The Office argues, however, that the Section 114 exemption was only

sions made by a preexisting satellite digital audio radio service. This section explicitly excludes transmissions that are part of an interactive service; however, it does not specify whether the process of transmission should involve streaming. *Id.*

¹¹⁴ *Bonneville Int'l Corp.*, 153 F. Supp. 2d at 779, n.18 (noting that while the court refers to the process at issue as streaming, "the Copyright Office refers to the same activity as 'AM/FM webcasting' and that "[t]he terms are interchangeable in this opinion").

¹¹⁵ 17 U.S.C. §114(j)(3) (2000).

¹¹⁶ *Bonneville Int'l Corp.*, 153 F. Supp. 2d at 771 (interpreting the exemption under Section 114(d)(1)(A) as limited to "over-the-air transmissions by FCC-licensed broadcasters").

¹¹⁷ 17 U.S.C. §114(d)(1)(B)(i) (2000); *see also Bonneville Int'l Corp.*, 153 F. Supp. 2d at 776 (discussing plaintiffs' argument that this particular limitation applies to third party retransmission only and not to simultaneous transmissions by the originator of the broadcast signal).

¹¹⁸ *See* Public Performance of Sound Recordings, 65 Fed. Reg. at 77,295 (explaining that Congress passed the DPRA to prevent the use of digital technology to facilitate the illegal duplication and transmission of copyrighted recordings).

¹¹⁹ *See* Sarah H. McWane, *Hollywood vs. Silicon Valley: DeCSS Down, Napster to Go?*, 9 COMM.LAW CONSP. 87-88 (2001) (opining that, "The ease with which Internet users can copy and download digital files has put both the Motion Picture Association of America [MPAA] and the [RIAA] at risk of potentially losing billions of dollars to hackers and pirates over the distribution of digital content").

¹²⁰ *See* Phelps, *supra* note 9, at 20 (discussing the benefits of statutory licensing to webcasters who can negotiate a blanket license fee with RIAA rather than having to enter into lengthy negotiations with each record company).

¹²¹ Public Performance of Sound Recordings, 65 Fed. Reg. at 77,297 ("Broadcasters argue that the pivotal element in the definition is the designation of the nature of the entity making the transmission, not the method of transmission").

¹²² 17 U.S.C. §§114(d)(1)(B)(i)—(iii) (2000).

intended for local transmissions of "over-the-air" broadcasts.¹²³

The Office's argument ignores the legislative history of the DPRA. The 1995 Senate Report accompanying the enactment of DPRA emphasized the need to preserve the traditional relationship between radio stations and recording companies.¹²⁴ Traditionally, radio stations were not subject to performance right licensing fees. This was primarily because there was no sound recording liability when radio stations started broadcasting and also because record companies considered radio stations as beneficial to record sales and did not view them as competitors.¹²⁵ It appears that the recording industry has now discovered the untapped revenue potential of collecting additional licensing fees from radio stations that stream their signals through the Internet.¹²⁶

V. THE FUTURE OF BROADCASTERS UNDER THE NEW LAW

A. Historical Anomaly

Copyright law distinguishes between public and private performances. The Copyright Act defines "sound recording" as the result of the fixation of sounds, such as musical sounds, on a tangible medium such as a tape or compact disc.¹²⁷ A "public performance" is defined as a performance outside

of the normal circle of family and friends, such as a concert.¹²⁸ Similarly, the broadcasting of a sound recording on the radio is considered a public performance.¹²⁹ Thus, streaming on the Internet is considered public performance; however, the reception of sounds on the user's computer may be considered a private use since the sound file is received by the addressee only.¹³⁰

The recording industry asserts that an anomaly has long existed in copyright law which has persistently denied exclusive public performance rights to the producers of sound recordings.¹³¹ The Copyright Office and the RIAA believe that the DPRA and the DMCA were enacted for two purposes: (1) to correct this historical anomaly and (2) to protect record companies from unauthorized copying of sound recordings made possible by advances in new technology.¹³² Thus, the recording industry believes that, in order to remain viable, it must subject all streamed music to copyright liability for sound recordings, including those by FCC-licensed radio stations. The recording industry argues that failing to do so would create an unfair advantage for radio stations over webcasters.

B. Webcasters v. Broadcasters

The DMCA contains provisions addressing webcaster's activities.¹³³ These provisions are outlined

¹²³ *Bonneville Int'l Corp.*, 153 F. Supp. 2d at 781.

¹²⁴ S. REP. NO. 104-128, at 15 (1995) ("This legislation should do nothing to change or jeopardize the mutually beneficial economic relationship between the recording and traditional broadcasting industries.").

¹²⁵ See Wittenstein & Ford, *supra* note 4 (referring to the legislative history of the Copyright Act of 1976). In the broadcasters' view, "record companies are more than adequately compensated for the use of their music by receiving free advertising." *Id.*

¹²⁶ See Phelps, *supra* note 9, at 21.

¹²⁷ 17 U.S.C. §101 (2000) (defining sound recordings as "works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work, regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied"). Section 101 further defines fixation as embodiment in a "tangible medium" of some sort. *Id.*; see also Abrahamson, *supra* note 3, at 192 (discussing the evolution of the copyright protection law from the *White-Smith* "readability" or "direct perception" standard to the "tangibility" standard of the 1976 Copyright Act).

¹²⁸ 17 U.S.C. §101 (2000):

To perform or display a work 'publicly' means –
(1) to perform or display it at a place open to the pub-

lic or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or

(2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.

Section 101 further defines transmission as communication "by any device or process whereby images or sounds are received beyond the place from which they are sent." *Id.*

¹²⁹ LEAFFER, *supra* note 29, at 321.

¹³⁰ See Haun, *supra* note 20, at 51.

¹³¹ See Hatch, *supra* note 54, at S10898 (discussing the disparity of treatment between the rights of the composers and publishers, on the one hand, and the rights of producers of sound recordings, on the other).

¹³² *Id.* (discussing the availability of sound recordings to a vast audience not only through piracy and illegal duplication of tapes and records, but also through instant digital transmission by audio-on-demand services).

¹³³ 17 U.S.C. §114 (2000); see also §114(d)(2) (detailing Section 403 of the DMCA list of programming restrictions intended specifically for webcasters).

in Section 103 of the DMCA and appear in Chapter 12 of Title 17 of the U.S. Code. Section 1201 of the Copyright Act implements a new obligation to provide effective protection against circumventing the technological measures that webcasters are required to implement in order to qualify for a statutory license.¹³⁴

The *Bonneville* court did not distinguish between webcasters and FCC-licensed radio stations that simultaneously stream their signals over the Internet.¹³⁵ Although both groups use the same technology, FCC-licensed broadcasters stream their original signal over the Internet, whereas webcasters are Internet-based entities which design their programs either for direct streaming or retransmission of third party radio broadcasts through their web sites. Of these two groups, only the FCC-licensed broadcasters that simultaneously stream their signals through the Internet are affected by the Copyright Office's Ruling.

Broadcasters also differ from webcasters in other respects. First, broadcasters usually represent single channels and are regulated by the FCC. Thus, they have structured their programming formats and business models in compliance with the terms of their respective licenses. Webcasters, on the other hand, offer multi-channel programming and are not regulated by the FCC.¹³⁶ In addition, broadcasters have public service obligations toward the communities they serve, which webcasters do not. Finally, radio stations have always had harmonious relationships with the recording industry and have greatly aided in the promotion and sales of records. For these reasons, Congress could not have intended to burden broadcasters with complicated playlist

restrictions and hefty licensing expenses when it enacted the DMCA.¹³⁷

C. What Are the Options Available to Broadcasters?

Broadcasters and the NAB appealed the *Bonneville* decision. Some broadcasters have already applied for a compulsory license and are participating in CARP proceedings. The options available to the remaining FCC-licensed radio stations are: (1) to negotiate an exclusive license fee with each record company; (2) to apply for a compulsory license and pay a set fee to the RIAA; or (3) to cease broadcasting through the Internet if the cost becomes too prohibitive. Yet another option would be to broadcast through third party webcasters that have already negotiated a license fee with the RIAA.¹³⁸ The webcasters who are currently participating in CARP proceedings hope to negotiate different rates, depending on both the amount of musical programming they offer and whether the music is downloadable by the end-user.¹³⁹

Congress did not intend to force broadcasters into making significant programming changes which would alter their business planning and burden them with additional expenses.¹⁴⁰ The legislative history of the DPRA makes it clear that the exclusive right in public performance of sound recordings should not change copyright law as to traditional broadcasters.¹⁴¹ In order to be eligible to stream their signals through the Internet, however, broadcasters will be forced to change the format of their programming in compliance with the requirements of the DMCA. This

¹³⁴ 17 U.S.C. §1201 (2000).

¹³⁵ *Bonneville Int'l Corp.*, 153 F. Supp. 2d at 776 (rejecting the argument that Congress intended to subject retransmissions by third parties to copyright liability and exempt original transmissions by FCC-licensed AM/FM radios).

¹³⁶ DIGMEDIA.ORG, WHAT IS DIMA?, Digmedia.org, at <http://www.digmedia.org/about/faq.html> (last visited Nov. 9, 2001) ("DIMA. . . represents its members in negotiations and discussions with similar representative organizations, e.g., RIAA, ASCAP, BMI, Harry Fox Agency, and the National Association of Broadcasters"); Webcasters are represented by their trade association, the Digital Media Association. *Id.*

¹³⁷ See Ronald Gertz, *Radio to Pay for Internet Streaming*, 640 PRAC. L. INST. PAT. COPYRIGHTS, TRADEMARKS & LITERARY PROP. COURSE HANDBOOK SERIES 63, 66 (2001) (discussing the contradictory goals of the recording industry, which seeks to increase musical exposure via terrestrial radio stations while simultaneously suing to enjoin streaming over the

Internet and use of unrestricted playlists).

¹³⁸ See Wittenstein & Ford, *supra* note 42, at 8 (commenting, "If, by contrast, a radio station merely enters into a licensing agreement allowing a third party webcaster to stream the signal, the webcaster (rather than the radio broadcaster) would be required to obtain the license").

¹³⁹ *Bonneville Int'l Corp.*, 153 F. Supp. 2d at 767 (discussing the DRPA's proposed "three-tiered system for categorizing digital transmissions based on their likelihood to affect record sales").

¹⁴⁰ Hatch, *supra* note 54, at S10899 (ensuring that "this bill does not have unintended consequences for other copyright owners, be they songwriters, music publishers, broadcasters, or others").

¹⁴¹ 139 CONG. REC. S10897, S10900 (daily ed. Aug. 6, 1993) (statement of Sen. Feinstein) ("So-called analog transmissions by broadcasters – even of CD's – categorically will not be affected by this bill.").

in turn would require major changes in the radio stations' business strategies at excessive costs to broadcasters in operational expenses and licensing fees. Webcasters, on the other hand, are relative newcomers and can adapt their business plans to conform to the formatting and technological requirements of the DMCA.

VI. CONCLUSION

Should broadcasters lose their appeal, they must choose one of the above options. To negotiate voluntary license fees with individual record companies would result in lengthy negotiations and would be very costly. Compliance with the

DMCA provisions would result in major changes in programming and business planning. Finally, if broadcasters stopped streaming altogether, they would forgo the opportunity to join the new digital revolution.

Considering the legislative history of the DPRA and the DMCA, it seems improbable that Congress intended to bring such sweeping changes to the broadcasting industry and to subject it to the impractical conditions of statutory licensing. This would mean that Congress intended to effectively end the presence of FCC-licensed radio stations on the Internet, which is unlikely under even the broadest reading of the relevant legislative history.